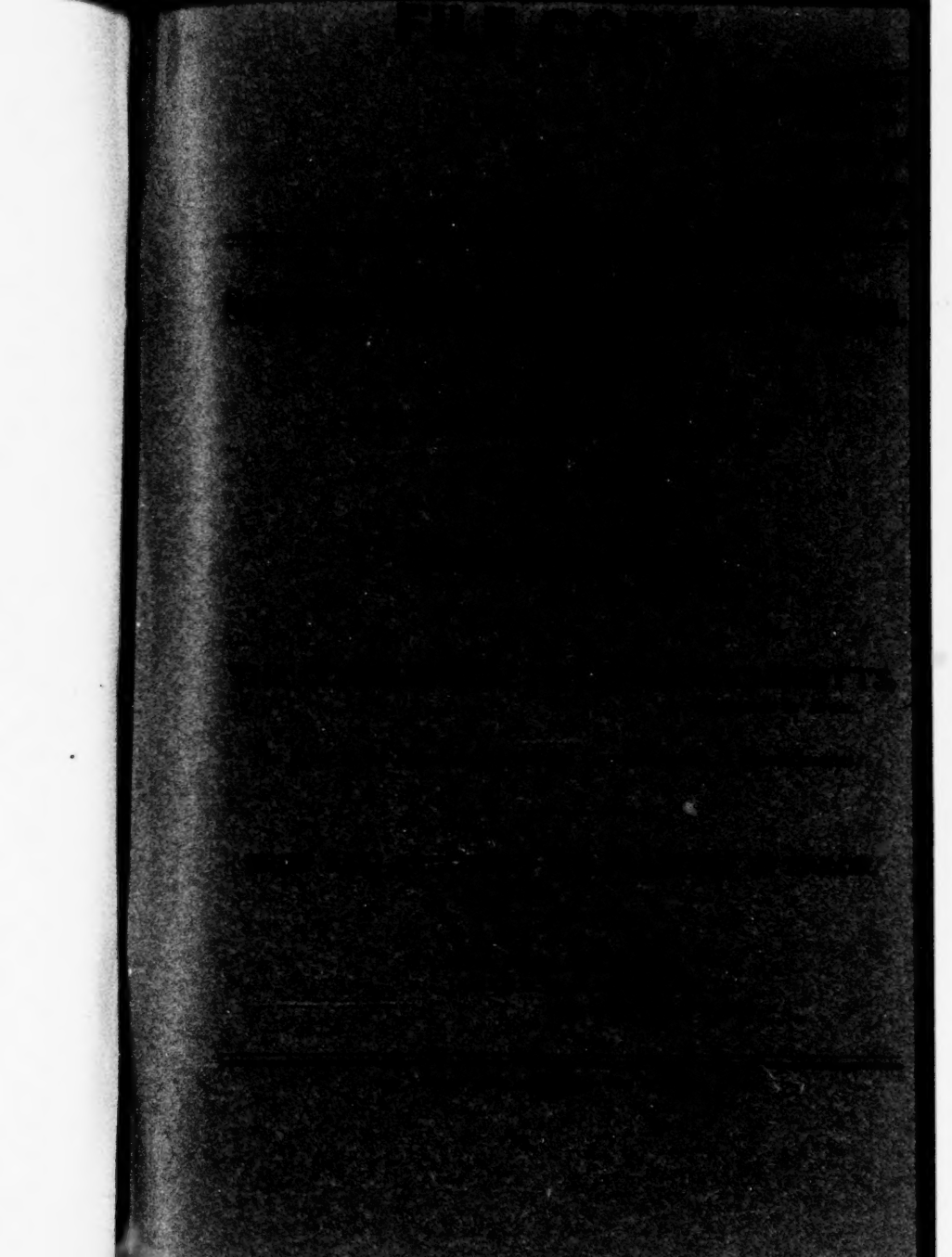

Supreme Court of the United States

No. 70. — October Term, 1904.

HENNING JACOBSON, Plaintiff in Error,

vs.

THE COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OF THE CASE.

The plaintiff in error was on the twenty-third day of July, One Thousand Nine Hundred and Two, brought before the Third District Court of Eastern Middlesex County upon a complaint under Revised Laws, Ch. 75, S. 137, which complaint (Rec. p. 2) was as follows:

"That the Board of Health in the City of Cambridge in said county, being of the opinion that it was necessary for the public health and safety, did require the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the first day of March in the year of our Lord One Thousand Eight Hundred and Ninety-seven, and did provide them with the means of free vaccination and that Henning Jacobson, being over twenty-one years of age and not under guardianship, did refuse and neglect to comply with such requirement."

To this complaint the plaintiff in error pleaded that he was not guilty, and upon hearing it was ordered by the Court that

the plaintiff in error "for the offence aforesaid forfeit and pay a fine of five ($5.00) dollars to the use of said Cambridge and that he stand committed until sentence be performed."

From this judgment and sentence the plaintiff in error appealed to the Superior Court for the County of Middlesex. In said Superior Court the plaintiff in error appeared on the twenty-seventh day of February, A. D. One Thousand Nine Hundred and Three, and thereupon was put upon trial before a jury, and said jury found a verdict of guilty. On the second day of March, A. D. One Thousand Nine Hundred and Three, the plaintiff in error alleged exceptions (Rec. p. 5) to the exclusion of certain evidence as follows:

He offered to prove and show by competent evidence certain facts set forth on pages 6 and 7 of the record, which in substance were that

1. Vaccination often results in injury to health.
2. Vaccination occasionally causes death.
3. Vaccination causes loathsome diseases.
4. The result of vaccination cannot be foretold in any case.
5. Vaccination results in incapacitating sickness, more or less prolonged.
6. Impure condition of the blood makes vaccination dangerous.
7. Danger from impurity of the blood cannot be tested.
8. Virus is often impure and purity cannot be tested.
9. Vaccination consists in inoculation with a disease by incision.
10. Inoculation causes numerous diseases.
11. Cow pox is analagous to syphilis, and sores are of a syphilitic nature.
12. Vaccination does not prevent smallpox but spreads the disease.
13. Defendant refused vaccination because he had previously suffered from it.
14. Defendant's son had suffered severely and defendant feared serious consequences.

Upon this question of evidence the Court ruled that each and all of the facts so offered to be proved by the defendant (plaintiff in error) were immaterial, and excluded each and all of them, and all of the evidence thus offered.

The defendant (plaintiff in error) asked the Court to rule and instruct the jury, among other things, (set forth in Rec. p. 6) that S. 137 of Ch. 75 was unconstitutional and void,

Because it was in derogation of the rights secured to the defendant by the preamble, the Fifth and Fourteenth Amendments and the spirit of the Constitution of the United States.

The defendant (plaintiff in error) thereupon requested the Court upon the foregoing evidence to order a verdict of not guilty, but the Court refused to give any of the rulings or instructions requested, and ruled and instructed the jury in substance that if they believed the evidence introduced by the Government, and were satisfied thereby beyond a doubt that the defendant was guilty of the offence charged, they would be warranted in finding a verdict of guilty.

The jury found and returned a verdict of guilty, and the defendant (plaintiff in error) duly excepted to the rulings and instructions and to the exclusion of the evidence offered, including the several offers of proof above enumerated, and to the refusal of the Court to order a verdict of not guilty.

Said exceptions were allowed March second, One Thousand Nine Hundred and Three, and were heard by the Supreme Judicial Court, which decided, on the second day of April, One Thousand Nine Hundred and Three, that the exceptions should be over-ruled for the reasons set forth in an opinion delivered by the Court, June tenth, One Thousand Nine Hundred and Three (Rec. p. 15). See

Commonwealth *v.* Pear and Jacobson, 183 Mass. 242.

Thereupon on the fifteenth day of June in the Superior Court the defendant (plaintiff in error) was sentenced to pay a fine of five ($5.00) dollars, whereupon this defendant sued out a writ of error, which was issued June fifteenth, One Thousand Nine

Hundred and Three, by the Chief Justice of the Superior Court, in which writ this defendant prayed for a reversal of the final judgment aforesaid, and as causes of error assigned substantially as above set forth, that Sec. 137, Ch. 75 of the Revised Laws of the Commonwealth of Massachusetts was unconstitutional and void as against the preamble of the Constitution, as against Article V and Article XIV of the Amendments of the Constitution, and as against the spirit of the Constitution of the United States, and further that the Court erred in excluding the evidence above set forth, and refusing to rule as requested by the plaintiff in error.

BRIEF OF ARGUMENT.

Points and Authorities.

Revised Laws, Ch. 75, Sec. 137, are as follows:

"The Board of Health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars."

An exception to said section is contained in Revised Laws, Ch. 75, Sec. 139, as follows:

"Children who present a certificate, signed by a registered physician that they are unfit subjects for vaccination, shall not be subject to the provisions of section six of chapter forty-four or of the three preceding sections, and their parents or guardians shall not be liable to the penalties imposed by section one hundred and thirty-six."

The plaintiff in error does not press the assignment No. 2, which relates to the Fifth Amendment to the Constitution of the United States, but respectfully submits that said section is unconstitutional:

1. Because it is contrary to the preamble of the Constitution of the United States, which declares that the Constitution is ordained and established "to promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

2. Because it is contrary to the Fourteenth Amendment of the Constitution, to wit, Sec. 1 thereof, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Compulsory Vaccination not yet Considered by this Court.

The right of the state under police power to enforce vaccination upon its inhabitants has not yet been determined, or more than remotely considered by this Court.

Mr. Justice Browne delivering the opinion in

Lawton *v.* Steele, 152 U. S. 133,

in reciting the powers which might be wielded by the state, remarked that they had been held to include "The compulsory vaccination of the child," but cites no authorities and makes no further reference to the subject.

Mr. Justice Strong in

Hannibal and St. Joseph Railroad Company, 95 U. S., 465.

refers to the right of the state to exclude "persons afflicted by contagious or infectious diseases."

Mr. Justice Peckham in the recent case of

The American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94,

in considering the right of the Postmaster General to prohibit

the delivery of letters alleged to be fraudulent, refers to the subject of vaccination in these words.

"As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

"Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses."

The plaintiff in error knows of no other cases in which the subject of vaccination has been considered by this Court.

A SUMMARY OF VACCINATION LAWS.

Vaccination Statutes in the United States.

Thirty-four states of the Union have no compulsory vaccination law, as follows:

Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.

Compulsory vaccination exists in eleven states, as follows:

Connecticut, Georgia, Kentucky, Maryland (of children),

Massachusetts, Mississippi, North Carolina, Pennsylvania (in second class cities), South Carolina, Virginia and Wyoming.

In thirteen states exclusion of unvaccinated children from the public schools is provided, as follows:

California, Georgia, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota and Virginia.

It thus appears that three-quarters of the states of the Union have not entered upon the policy of enforcing vaccination upon their inhabitants by legal penalty. Not one of the states undertakes forcible vaccination of its inhabitants, while the states of Utah and West Virginia expressly provide that no such compulsion shall be used.

Smallpox has ceased to be the scourge which it once was, and the plaintiff in error believes that there is a growing tendency to resort to sanitation and isolation rather than vaccination.

It is certainly not apparent that the states which make no provision for vaccination are any more afflicted with the disease of smallpox than those which undertake to force vaccination upon their citizens. Even the State of New York, which imports the major part of the immigrants who annually enter this country, has not undertaken to force upon the people the compulsory vaccination policy.

In other countries these laws are constantly called into question. The Queen of Holland has recently recommended the repeal of the compulsory vaccination laws of her kingdom. There are no vaccination laws in New Zealand, and Switzerland has by plebiscit abolished all compulsory vaccination.

The English law (61 and 62 Vict. Ch. 49), provides only for the vaccination of children, under a penalty, and furnishes to the people a special vaccinator. But under Sec. 2 of the Act no parent is liable to a penalty if he satisfies a magistrate that he conscientiously believes that vaccination would be prejudicial to the health of the child and gives a certificate of such conscientious objection. Thus it appears that even in England the state does not attempt to enforce vaccination upon adult citizens and re-

spects the conscientious objection of a parent to the inoculation of his child. Even these laws, apparently harmless when compared with the compulsory acts of eleven of our states, have excited violent opposition in many towns and cities, and occasioned much heated agitation against the laws.

In the early part of November, 1904, riots were reported in Brazil arising from the attempt to enforce vaccination upon the citizens.

In 1903 the State of Minnesota, in Ch. 299 of its laws of that year, abolished vaccination as a condition precedent to school attendance and compulsory vaccination of a child by any board or public officer.

In 1901, Governor La Follette, of Wisconsin, vetoed a compulsory vaccination bill similar to that of Massachusetts, even though it exempted persons securing certificates of physicians that vaccination would be dangerous to their health, and all persons declaring that it was contrary to their religious belief. The governor in his veto message declared that the "police power to preserve public health must be exercised only from necessity plainly evident." He further declared that "It might be well questioned whether the opinions or judgment of the health officers can be accepted in lieu of facts as the determinate evidence of necessity for such exercise of legislative power." He further said that "the exempting provisions of this bill afford legislative recognition of the existence of more grave dangers to the citizen than the liability of contagion from the loathsome disease which is sought to be avoided." He added "But I cannot ignore the fact that laws of this character are repugnant to very many good citizens, even among those who are not opposed to vaccination from religious beliefs or prejudices. In some states they have resulted in riots and strife which have outlived the epidemic. Within very recent years, laws providing for compulsory vaccination have been repealed in respect to experience."

In the State of Indiana, after the decision in the case of

Beech *v.* Blue, 155 Ind. State, 121,

that vaccination was a condition precedent to attendance in the public schools, the people promptly amended the statutes by legislative act of March 11, 1901, to obviate this decision.

It should be observed that in the case of

Osborn *v.* Russell, 64 Kansas, 507,

it was decided that under a law to "supervise the health interest of the people of the state" the state board of health had no power to enforce vaccination as a condition of attendance upon public schools. This case is suggestive as indicating that, apart from a specific legislative act for compulsory vaccination, the courts will not imply the existence of such a police power in the public authorities though vested with the largest authority to protect the public health.

Cases Considered in the State Courts.

The cases involving vaccination laws which have already been considered by State Courts have mainly been decided upon statutes relating to the exclusion of children from the public schools.

Bissell *v.* Davison, 65 Conn. 183.
Abeel *v.* Clark, 84 Cal. 226.
State *v.* Zimmerman, 86 Minn. 353.
Osborn *v.* Russell, 64 Kan. 507.
Potts *v.* Breen, 167 Ill. 67.
Duffield *v.* Williamsport School District, 162 Pa. 476.
State *v.* Burdge, 95 Wis. 390.
Re Rebenack, 62 Mo. App. 8.
Blue *v.* Beach, 155 Ind. 121.

The only cases which have considered general compulsory vaccination laws are

State *v.* Hay, 126 N. C. 999.
Morris *v.* Columbus, 102 Ga. 792.
Re William H. Smith, 146 N. Y. 68.

State *v.* Hay, 126 N. C. 999, determines as follows:

The laws of North Carolina give authority to the local boards to secure the vaccination of inhabitants within their jurisdiction. The Court, in this case, in construing the law assumed that where it would be unsafe to submit to vaccination the Legislature did not intend to enforce the law. It was indicated by the Court that it was a matter for defence and for the jury what circumstances would relieve a person from a compliance with the law.

Douglass, J., in concurring, declared that it could not be supposed that the Legislature intended to enforce the law where the conditions of health might make it dangerous, and that there must be some tribunal to determine when such conditions exist. This power he deemed rested in the courts and that even if the law were for the general welfare there must be a limit. He suggested that the law to kill all persons with a certain disease could not be enforced. "Therefore, can we suppose that the Legislature either would or could enforce vaccination even under the peculiar conditions of health of the past, if it might reasonably be expected to endanger his life."

Morris *v.* Columbus, 102 Ga. 792, was a case under an ordinance of the City of Columbus which had authority from the Legislature to declare that vaccination should be compulsory on all persons living in the county or any part thereof. The ordinance excepted persons furnishing the certificate of a physician that the injection of the virus would be injurious. It was held that this was a reasonable exercise of power conferred upon the city authorities by the Legislature.

Re William H. Smith, 146 N. Y. 68, the relators complained that they were restrained of their liberty in Brooklyn by order of the Commissioner of Health, who alleged as the cause that they had refused to be vaccinated. The Commissioner claimed the right to quarantine any person refusing to be vaccinated. It was held that the statute contemplated that where persons or properties are to be affected by isolation *the fact must exist* either that they are infected with the contagious disease or that they

have been exposed to it; that legislation had not relieved officials from the responsibility of showing that the exercise of their power was justified by the facts in the case. The Court expressly decided that the power of the Legislature to enact the health law was not involved, but the issue was whether the exercise of power by the Commissioner of Health was warranted. The Court held that the action of the Commissioner of Health was not warranted.

It will be perceived that in the North Carolina case it was assumed that due process of law entitled a defendant to offer evidence that vaccination would be injurious to him. Under this decision the plaintiff in error was entitled to present to the jury his evidence that his former vaccination had been attended with serious results.

In the Georgia case provision was made for the exemption of a person who presented a certificate that vaccination would be injurious.

In the New York case it was held that the fact of existence of a contagious disease, or of exposure to it, must be established before the health authorities could exercise the police power of quarantine or isolation.

None of these cases are as extreme as the decision in Massachusetts upon the case of the plaintiff in error.

School Cases Distinguished.

The laws providing that unvaccinated children shall not attend the public schools are widely variant from laws compelling the vaccination of adult citizens.

The public school is a state institution in the nature of a beneficent business enterprise for the improvement of the population. No right to attend the schools is inherent in our laws, unless the state constitution confers it. Attendance at school is a privilege. The school is a part of the state's domestic economy, and the state may regulate it in its own discretion. It may exclude any one it chooses.

To provide vaccination as one of the conditions of admission

to school is widely different in legal status from providing a legal penalty upon citizens for refusing vaccination.

The police power is not at all involved in exclusion from the schools; but it alone can warrant interference with the person of the citizen.

These cases do not involve what the plaintiff in error complains of as "compulsory vaccination."

The school cases may therefore be dismissed from consideration with a reference to the case of

Bissell *v.* Davison, 65 Conn. 183.

It was there held that the statute authorizing exclusion of children from the public schools for failure to be vaccinated formed a part of the laws relating to the common school system, and must be read as part of those laws. It was held that to attend school was a privilege, and not a right, to be enjoyed under such conditions and restrictions as the law-making power within Constitutional limits might see fit to impose; that what restrictions might best subserve the ends sought in the establishment and maintenance of public schools was a question solely for the Legislature and not for the courts. That while the statute might authorize vaccination as one condition of admission to the public schools, it could not authorize or compel compulsory vaccination. The act was merely an exercise of power to promote the interests of the schools.

The Police Power is for the Security of Liberty and not for Oppression.

"The Fourteenth Amendment, in declaring that no state 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstance in the enjoyment

of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property."

Barbier *v.* Connolly, 113 U. S. 27.

To justify an exercise of the police power beyond the mere suppression of nuisances, it must appear that the interests of the public are affected and "*that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.*"

Lawton *v.* Steele, 152 U. S. 133.

The state intervenes to secure the personal health, preservation and comfort of the citizens, and punishes those who violate it. But except under compulsory vaccination laws it has not yet undertaken to attack the health of individuals.

The Police Power. Its Admitted Functions.

The plaintiff in error does not deny the right to the exercise of the police power within any accepted definition of that power.

Blackstone (4 Commentaries, 162) defines this power as "The due regulation of domestic order of the Kingdom, whereby the inhabitants of a state, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations."

Judge Cooley (Constitutional Limitations, page 704) declares "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offences against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."

While the police power might properly be exercised to protect this plaintiff in error as a citizen of the United States from compulsion from any source, even the state itself, to be inoculated with a disease, no constitutional precedent can be found which justifies the exercise of the police power to compel a citizen to submit himself to an assault and to inoculation with a disease.

Hannibal and St. Joseph Railroad Co., *v.* Husen, 95 U. S. 465, 470,

defines the character of police power in the following words:

"What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in Thorp *v.* Railroad Co., 27 Vt. 149,

'It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others.' . . . . It may also be admitted that the police power of the state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism or disturbances of the peace. It may exclude from its limits, convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in The Passenger cases, 7 How. 283, by Grier, J., in the sacred law of self-defense.

"The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of person and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive."

The plaintiff in error is willing to submit himself to such exercise of police power as is indicated in this decision of this Court. He does not deny that if he or his property be infected with

contagious or infectious disease, or if he commits any noxious act, it is the right and duty of the state to defend the rest of the community against him as a public, or even as a private nuisance, but nowhere within this decision, or any other which has been made by this Court can he be constitutionally made subject to such criminal prosecution when he is in health and does no act whatever which can offend his fellow-citizens.

The police power rests upon well-founded principles, all of which have their basis and reason in existing offensive acts or conditions. Offensive trades, noisome occupations, pollution of air or water, unsafe or unhealthy buildings, burials, transportation of dead bodies, cemeteries, burning fluids and adulteration of food or drink contain present conditions which are a menace to the public health or safety. The regulation of medicine and dentistry and similar occupations is based upon the protection of the community from unskillfulness in those who undertake to deal with the bodies or health of the people.

Mr. Justice Strong in

Hannibal and St. Joseph Railroad Co. *v.* Husen (*ubi supra*)

confines the exercise of police power to "persons afflicted by" or "animals having contagious or infectious diseases," but this court has not yet decided that the police power can be imposed upon healthy citizens, merely because as human beings they have the potentiality of contracting contagious diseases.

A Compulsory Vaccination Law Unreasonable, Arbitrary, Oppressive.

The plaintiff in error disclaims any objection to voluntary vaccination, which should be open to the citizen from free choice if he believes in its efficacy and desires to undergo its dangers. It is against the compulsory feature of the Massachusetts law that the plaintiff protests. A compulsory vaccination law, like that involved in the case at bar, is founded upon unreasonable and false theories in many respects.

1. The Law is Only Effective in Protection of Law Breakers.

It is not a reasonable or legitimate exercise of legislative power, because it undertakes to compel a man to do for the protection of other men what other men can voluntarily do to protect themselves. The law, therefore, is predicated upon a failure of its own enforcement, for if all the people of Massachusetts except the plaintiff in error were vaccinated and, therefore, immune, the plaintiff could do no harm to the rest of the community, and if he were neglectful of his own health the penalty would fall upon himself. The only possible victims of the plaintiff's failure to be vaccinated would be those who had themselves failed or refused to be vaccinated. In other words, who had themselves violated the law.

Is it possible that an exercise of the police power of the state can be predicated upon the protection of those who are themselves violating the law which calls forth such an exercise of power?

Viewed from the standpoint of the individual to be protected, may it not fairly be asked, if I, who neglect to be vaccinated, have a right to demand of my neighbor that he be vaccinated to protect me. Clearly if the method is effective I have it in my power to protect myself. Viewed from the standpoint of the community at large, if I am the only unvaccinated person, I suffer alone and others, who have become immune, are in no danger. The only answer to this proposition is that vaccination is but a partial remedy; this is but an argument against the law itself which, to obtain doubtful results, insists that the citizen should introduce into his own healthy system, and the systems of his children or wards, a disease which may produce ill-health and death. In any event, considering it as a partial remedy, every person in the community can avail himself by his voluntary act of whatever protection it affords, and I, in declining to avail myself of the same protection, am at best a possible and not a present menace to their health.

2. The Legal Penalty — Illogical and Unjust.

The defendant in error will hardly care to contend that the state has a right to seize upon the citizen and insert into his blood the virus of vaccination, although in England, under the Act of 1867 (30 and 31 Vic. Ch. 84), vaccination was enforced upon children in many cases, and it was judicially determined that where a parent had refused to cause the vaccination of a child the court might order the child to be vaccinated.

> Regina *v.* Justice of Cinque Ports, L. R. 17 Q. B. D. 191.
> Dutton *v.* Atkinson, L. R. 6 Q. B. 373.

The utmost that the law undertakes to do is to provide a penalty for its violation. After I have paid the penalty I am as much a menace to the community as I was before, and if the effect of the law be that with one payment I may continue to be a menace to the public health, as was held in England (Pilcher *v.* Stafford, 4 Vest & S. 775), the law is too absurd to justify its existence.

If I may be repeatedly fined for recalcitrancy, as was provided by the English Act 30 and 31 of Vic. Ch. 84, 31, See

> Allen *v.* Worthy, L. R. 5 Q. B. 163.
> Tebb *v.* Jones, 37 L. T. N. S. 576.

then the argument made by the Supreme Court of Massachusetts as to the insignificance of the fine of $5 is fallacious and unjust. The fine of $5 may be increased to $100 by the costs of prosecution, and if, as has occurred in Massachusetts, repeated prosecutions have been brought against the same individual, the accumulation of fines and taxes may become an insupportable burden and result in the imprisonment of the offender. There are many citizens of Massachusetts who cannot pay a fine of $5, and who must stand committed to prison under this law unless under such compulsion they submit themselves to the dangers of vaccination, and the violation of their persons. Any law providing a fine, together with the costs of prosecution upon appeal, as in this case, is practically compulsory upon a large

class of citizens who are without means of payment. As a man and his wife and family may be included in the prosecution, the seriousness of the penalty should not be underestimated.

3. *The Law Not of General Application.*

By the law of Massachusetts, children and minors under guardianship are exempted from penalty. Thus the law itself provides for classes in the community which may and must mix with the rest of the community unprovided with the alleged immunity of vaccination. But more than this, the law of Massachusetts only provides for local vaccination whenever the Board of Health of a city or town shall deem it necessary. Thus the law is not of general application throughout the state, and, assuming the efficacy of vaccination, all non-residents entering or leaving a city or town are as much a menace to the inhabitants as are those who may be amenable to this law through the initiative of the Board of Health.

Admitting, as the plaintiff in error does, that any person infected, or who has even been exposed to smallpox, is subject to all defensive measures of sanitation or isolation which the authorities may adopt, he does insist that as a healthy resident of the City of Cambridge he is discriminated against and oppressed by a law which subjects him to fine or imprisonment for refusing to inoculate himself with disease, while his fellow-citizens of the state may come into his city or his home as visitors, menacing as much danger as he could menace, and yet be free from all prohibition or penalty.

4. Compulsion to Introduce Disease into a Healthy System is a Violation of Liberty.

The plaintiff in error offered to prove at his trial, what the defendant in error will hardly deny here, that vaccinia, which results from vaccination with cow lymph, is a disease that is produced by inoculation through incision or puncturing. In other words, it involves a surgical operation upon the person of the citizen and the introduction of an independent disease which does not

otherwise afflict humanity. It is a disease known in common parlance as cow pox.

In the history of our Republic, and, indeed, of England, there is no parallel to such legislation. A person, healthy or unhealthy, is required, under the penalty of the law, to submit himself to the dangers of a new disease, which, as is well known and as was offered to be proved by the plaintiff in error, often causes loathsome and dangerous diseases.

Were the state to seize upon a citizen and by force compel him to submit to such an operation, revolution and overthrow of the government would be the certain result among a free people. If so obnoxious a process is forced upon a citizen under the penalty of the law, nothing but absolute certainty of the results and the direst necessity can justify such legislation.

"Life is the gift of God and the right to preserve it is the most sacred of the rights of man." Swayne, J., in

Slaughter House Cases, 16 Wall, 36.

Yet the plaintiff in error offered to prove in his second proffer of evidence that vaccination causes death.

"Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny." Swayne, J. (*ubi supra.*)

Yet the plaintiff offered in vain to prove that vaccination by incision is a cause of disease; is followed by suffering and sickness in all successful inoculations, more or less severe, and that the plaintiff and his son had theretofore been caused great suffering by such inoculation.

By what precedent of Constitutional or Statutory law can a citizen be punished who menaces no present injury to his fellowmen, and who objects to a present injury to himself, inflicted upon the order of the state for the purpose of protecting others from possible injury. Wherein has a citizen violated the law upon which the police power is based, viz.: That he shall so use his own as not to injure others. Surely in going about in the community, healthy and law-abiding, he does no injury to the

community or the state, and the plaintiff in error challenges upon any theory of the legislative power in this Republic the right of the state to penalize him for preserving his health, even against the admonition of the state.

The preamble of the Constitution declares it to be one of the purposes of the instrument to "secure the blessings of liberty to ourselves and our posterity." Liberty of the citizen in the very first analysis is immunity of his person from seizure or injury, except for the commission of an offence against the state, and the vaccination law of Massachusetts is a violation of his fundamental right to liberty as guaranteed to English speaking peoples from Magna Charta, through the Constitution of the United States to the Fourteenth Amendment.

Damage Without Compensation

In Miller *v.* Horton, 152 Mass. 546, it was decided, under a law providing for the killing of infected animals, that "a public officer would be liable in damages if an animal killed was not in point of fact infected with the disease."

If the owner of an animal is entitled thus to recover for loss of property, shall he be held to be without remedy where his own health is injured by the state.

Yet here is a law which makes no provision that the state shall supply physicians or pay the expense of physicians who may attend and treat a vaccinated person when he is suffering from a disease inflicted by order of the Legislature. While a citizen afflicted with a menacing disease is liable under the law to be restrained of his liberty, isolated from his fellow-men and subjected to disinfection, it may be questioned whether within the rules of constitutional liberty he could be forced to submit to surgical operations against his protest. How much higher and more unquestionable is his right when in full health to be free from such infliction; but if the state cause him to suffer, and inflict a sickness which incapacitates him from labor, by what constitutional right can the state thus deprive him of liberty and property without compensation?

The Vaccination Law not within any Cognizable Principle of Criminal Law.

The plaintiff in error respectfully submits that he has been subjected to punishment under a law which has no basis in the established principles of criminal law, and that it is not within the sovereign right of any state to create an offense by statute which has none of the recognizable features of a criminal act in either American or English jurisprudence.

A crime consists, according to every accepted definition, in an act done with an evil intent. While it may be that the refusal to obey the statute of the Commonwealth may be taken to constitute an evil intent, none the less if the plaintiff has done no act whatever, either of negligence or commission, an intent cannot be presumed.

"To entitle the state to complain some act must have followed the unlawful thought. This doctrine is fundamental and in a general way universal." (Bishop, Crim. Law, Vol. 1, Sec. 204.) Likewise to constitute a crime the public must suffer. (*Ib*, Sec. 230.) It is true that the act may be an act of omission, but the omission must involve "a degree of negligence which naturally leads to certain results." And within this rule the State of Massachusetts has even gone beyond other states in holding that no crime is committed, even where death resulted from the administration of powerful drugs, if there was an honest intention and purpose to cure. (Com. *v.* Thompson, 6 Mass. 134.)

The criminal law undoubtedly extends to the protection of public health, convenience and safety, and under this head numerous offences in the character of nuisances are cognizable.

With respect to contagious diseases, the duty of a citizen is well defined in Mr. Bishop's Criminal Law, Vol. 1, Sec. 490.

"It is no crime for a man to be sick of a contagious disease in his own house, or his friends to decline removing him, but if he goes into the public way or takes out an infected child, or a horse, with a disease communicable by infection to man it is indictable."

Likewise it is not denied that the maintenance of a filthy house or unhealthy manufactures is indictable. The selling or keeping for sale of unwholesome food, violations of quarantine, importing infected cattle, conducting noxious trades and selling adulterated milk are all indictable nuisances within well-accepted principles of the law; and the maintenance of an existing nuisance or menace to the community constitutes the act which is cognizable by the criminal law.

For the protection of population the criminal law punishes suicides or self-mayhem, because a man may not deprive the community of what he may do for it by taking his own life or incapacitating himself for public service. (Bishop, Criminal Law, Vol. 1, Sec. 513.)

To this extent the state protects the citizen himself against his own act and has the right to preserve the health of the citizen for the service of the state and his fellow-men, but this is not parallel with a demand of the state that a citizen shall, by force of a legal penalty, lay violent hands upon himself or permit the representative of the state to lay violent hands upon him against his will.

If a man obstruct public places or keeps explosives in populous places he is exposing, by the present menacing character of his act, the public to an existing danger. So in the carrying of dangerous weapons, so in any disturbance of the peace or repose of the community, there is some positive condition which constitutes an act, which of its own nature involves an evil intent. In most cases the condition existing is that of a nuisance to the community.

There was no act on the part of this plaintiff in error either of omission or commission, nor was there any intent, good or evil, to constitute a crime. His condition of health menaced neither any man nor the community. By his negligence no one has suffered.

Everything of *sufficient magnitude*, calculated to impair the public health is indictable. (Bishop, Crim. Law, Vol. 1, Ch. 35.)

The possibility that plaintiff, or any other citizen, may be

hereafter infected with smallpox is too small a matter upon which to predicate a criminal penalty.

There is no such offense known to the law as neglect or refusal to protect one's self from disease. It is not a nuisance for the plaintiff to remain healthy.

Misprision of nuisance is the utmost claimable for this offense and there is no such thing as misprision of a misdemeanor.

This attack upon the person of the citizen is no more to be justified by a mere legislative act than would be acts of attainder, bills of pains and penalties and acts of confiscation, which would not be cognizable or constitutional in the United States.

Dartmouth College *v.* Woodward, 4 Wheat. 518, 581.

Applying any yet accepted test of a criminal act, the vaccination statute of the State of Massachusetts fails of justification, and if the law has any basis in the history of our civilization and development, this statute, and all others of a like character, must fall under the ban as a violation of liberty and devoid of due process of law. .

The Exemptions in the Mass. Act are Unconstitutional.

The section of R. L. Ch. 75, which is in question, and section 139 following, contain exemptions from the operation of the act which furnish the testimony of the act itself that the legislative enforcement of a compulsory vaccination law is unjust and oppressive. Section 137 exempts from its own operation persons under 21 years of age and persons under guardianship, and section 139 exempts children who present certificates from physicians that they are "unfit subjects" for vaccination.

An adult citizen is thus penalized, where minors are exempt, and is excluded from furnishing evidence to the public authorities that he is an "unfit subject" for vaccination, and he must, regardless of his condition of ill-health, either submit to the dangerous operation or be subjected to a fine or imprisonment for refusal.

In the case at bar the plaintiff in error undertook to show that he had suffered seriously from previous vaccination, thus indicating that his system was sensitive to the poison of vaccination virus. The like illness of his son indicated that a hereditary condition existed which would cause the system to rebel against the introduction of the vaccine matter.

And it is clear from the statute that if the plaintiff in error had offered the opinion of a physician that vaccination might even be deadly in its effects upon the plaintiff, the law recognized no such defense, and the evidence must have been excluded. The law itself, therefore, testifies to its own oppressive and unreasonable character.

It is not due process of law, when such a defense is excluded. It is not equal protection of the laws, when such defense is open to parents for the protection of children and is not open to parents themselves. The right of the plaintiff was "of such an important and fundamental character as to deprive him of his liberty without due process of law."

West *v.* Louisiana, 194 U. S. 258, 262.

Likewise in exempting children with certificates the court can "see clearly that there is no fair reason for the law, that would not require with equal force its extension to others whom it leaves untouched."

Missouri, Kansas & Texas Ry. Co. *v.* May, 194 U. S. 267.

As this protection is a vital and necessary right of self-defense, the exemption of children does not constitute a classification which has a "*reasonable basis*," and it is mere "arbitrary selection."

Gulf, Colorado, etc. R. R. Co. *v.* Ellis, 165 U. S. 150.

The Board of Health Entrusted With Arbitrary Powers.

The Board of Health, not a judicial tribunal, is vested with the authority which determines substantial rights of the citizen.

1. It may enforce vaccination without regard to the existence of smallpox or its severity. The law of Minnesota opens up the question of fact as to the existence of an epidemic, and does not leave it to the caprice of a board of health to impose vaccination, when the community is not really menaced.

2. The law does not define what constitutes vaccination. Hence a citizen of one town or city may be required to be vaccinated every year or every month, while the citizen of another town may be required by another board of health to subject himself to vaccination once in many years or not at all. The plaintiff in error insists that this is not the equal protection of the laws which is guaranteed by the Fourteenth Amendment of the Constitution.

3. There should be all possible tests of the vaccine matter by the state, or the vaccine matter should be prepared and furnished by the state so that the citizens may not be in doubt as to which of the vaccine matters may be the least dangerous. If it be a legitimate function of the state to introduce disease into a citizen, it would seem clear that the state ought to prepare the disease, so as to give assurance that only the right disease is to be injected.

4. If, as the Massachusetts Court has held, this law cannot be assailed because necessity does not exist for its application, or because plaintiff has suffered severe results from the same operation, or because the process is inefficacious, dangerous, and it cannot be made certain or safe, then the board of health is the only tribunal to which he can appeal and as this is not a judicial tribunal he is deprived of his liberty without due process and of the equal protection of the laws. The board of health determines necessity, methods and plaintiff's rights without hearing.

Chicago, Milwaukee *v.* St. Paul R. R. *v.* Minnesota, 134 U. S. 418.

Hagar *v.* Reclamation District No. 108, 111 U. S. 701.

The oppressive character of the law of Massachusetts appears in the fact that it forces vaccination upon all persons in a given

city or town whether they be sick, aged, infirm, diseased, including pregnant women, who have not the privilege bestowed upon minor children to present the certificate of physicians that their health would be endangered by vaccination. The arbitrary decision of the health authorities constitutes his only safeguard.

The Massachusetts Law has not the Justification of Necessity.

The unreasonableness of the vaccination law further appears in the fact that vaccination is not an absolute preventive, and no physician or health board would undertake to declare it to be other than a partial or possible preventive. Such a claim would be absurd in the face of the thousands of demonstrations to the contrary. In a compulsory law of this character can the extreme exertion of police power be based upon so doubtful a matter. His Honor, Mr. Justice Holmes, in the case of

Miller *v.* Horton, 152 Mass. 546,

speaking of the exercise of the police power used these words:

"It would seem doubtful at least whether actual necessity ought not to be the limit when the question arises under the Constitution between the public and an individual."

Taking these words in connection with the statement of Mr. Justice Peckham in

American School of Magnetic Healing *v.* McAnnulty, (*ubi supra*)

it would appear to have already suggested itself to justices of this Court that vaccination is a matter of opinion upon which authorities are divided, and that where the right of the state and the rights of the individual clash under the police power, necessity should be the test of the exercise of that power. Not only is vaccination not proved to be a necessary precaution against smallpox, but at the most it relieves from the remote chance of infection, while it is, as the plaintiff offered to prove, and as is

within general knowledge, sure to produce some sickness, pain and inconvenience, and in frequent cases produces serious results.

The Exclusion of Plaintiff's Evidence.

The plaintiff in error begs to call attention to his offers of evidence which would have shown that medical science has not yet shown what cow pox is, and why it only appears in female kine. The very character of the inoculating material and the method of preparation have shifted from year to year and are still a matter of serious difference of opinion.

The law of Massachusetts does not state what vaccination is or what vaccine matter must be used in order to constitute vaccination. Before cow pox was discovered inoculation from one person to another was the method adopted.

The plaintiff might have proved from Dr. S. W. Abbott, secretary of the Massachusetts State Board of Health for many years, that for twenty years his lack of confidence in the lymph produced in Massachusetts, was such that he had never used or purchased a particle of it.

It is lustily claimed by manufacturers of vaccine points that glycerinated vaccine is a breeder of bacteria and of disease, and the manufacturers of glycerinated vaccine in turn, charge that vaccine points are liable to infection or poison in their operation.

Public prints cannot have escaped the attention of the members of this court which contain violent denunciations among the advocates of the different kinds of virus, and from this discussion it would appear that there is not a virus in the market which is free from contamination and danger except that which is manufactured by the person then speaking.

It is familiar that eminent medical authorities assert that vaccination is utterly ineffective in curbing smallpox, and that the disease and evils arising from it are much greater than those arising from smallpox itself.

The plaintiff in error might have proved, had he been allowed, that Dr. Willson, as stated by him in the Journal of the American Medical Association, May 10, 1902, has personally investigated fifty-two cases of tetanus arising from vaccination.

The plaintiff might have exhibited the health reports of the State of Massachusetts which in each year are full of cases of persons who have contracted smallpox after successful vaccination.

It was left to the Board of Health of the city of Cambridge to determine how often a person must be vaccinated in order to become immune and it decided that five years was a reasonable limit. Yet the originator of cow pox insisted that vaccination, once effective, would last a lifetime, while the law of Germany requires vaccination every seven years, and Dr. Durgin, chairman of the Boston Board of Health, in the Boston Medical and Surgical Journal, December 25, 1902, declares that "a child should be vaccinated repeatedly until it no longer takes effect."

Effect of Intrenching a Compulsory Vaccination Law.

It is true that the police power is a shifting quantity expressing more or less social, economic and political conditions (See Freund on Police Power, page 3), and the decision in this case may to a great extent be determinative of the methods to be hereafter employed in the treatment of contagious diseases.

If vaccination of a healthy person enforced by penalty is justified by the highest court of the land, it will fix the tendencies of the health authorities and of physicians to increase the use of such methods.

Dr. Marmoreck has discovered a serum for the cure of tuberculosis. It would be much more reasonable to enact laws for compulsary inoculation with his serum, inasmuch as tuberculosis kills hundreds of citizens where smallpox kills one.

September 22, 1904, The Boston Medical and Surgical Journal reports the increasing prevalence of diphtheria in Newark, N. J.,

and says, "The Board of Health is acting energetically in the matter and has adopted the practice of ordering preventive anti-toxin inoculation in the members of families of persons attacked.

Dr. Maragliano has recently reported, in the Berliner Klinische Wochenschrift, June 13, 1904, that he has an anti-dysenteric serum and believes it possible to render people immune against the disease by its use.

The publications concerning the litigation in the matter of Mrs. Crocker have called to attention recently the claims which are made for the curing of cancer by inoculation of serums.

The present tendency of medical science is toward the treatment of contagious diseases by the use of serums, and it is entirely possible that public authorities and physicians may be encouraged to extend the vaccination scheme to all other contagious diseases and set up a general compulsory medical regime, which will subject a healthy community to attack by boards of health under compulsory laws. If it be justifiable to compel the inoculation of a citizen for one disease, then by a parity of reasoning it is for the public interest that every citizen should be inoculated to render him immune against all possible contagions which may menace the community.

The terrible results, which have repeatedly followed vaccination, have alarmed many of our citizens, and if we are to be subjected to further experimentation upon our bodies, to guard against other diseases, vivisection will become a human question of prime importance.

The plaintiff in error is making no contention here against the voluntary use of vaccination or against methods of treating actually existing contagious diseases.

In the treatment of actually existing disease the public authorities may have the right to impose inoculation upon persons who may be tuberculous, diphtheretic, cancerous or dysenteric, inasmuch as in a diseased condition they may be taken to be a menace to the public health and regarded as nuisances in the eye of the law. The court has here to deal with a man in full health

who objects to inoculation with a disease and to a punishment for declining to subject himself to injury.

The claim of those who are opposed to vaccination, including many leading medical authorities, is that the proper treatment of epidemic contagious diseases is sanitation and isolation.

The plaintiff in error might have proved at his trial, had the evidence offered not been excluded, that in the year 1900 there were 993 cases of smallpox in the city of Cleveland, and 1223 cases from January to August of 1901; that Dr. Martin Friederich, chief of the Cleveland Board of Health, seeing the inefficiency of vaccination which had prevailed up to that time, and being alarmed by several cases of tetanus which had occurred in consequence of vaccination, stopped the use of vaccination and undertook to treat the epidemic through disinfection, removal of filth and isolation of patients. The result was that in a year thereafter there was not a single case of smallpox remaining in the city, though under full swing of vaccination the disease had raged uninterruptedly from 1893 to August of 1901.

The plaintiff would also have been able to prove that in the city of Leicester, England, the people rebelled against vaccination and took up effective sanitation. The authorities have since then been unable to enforce the vaccination laws, and Leicester is now the least vaccinated city in England and the freest from smallpox.

Security of Freedom Involved

The plaintiff in error makes no attack upon the legitimate use of the police power, when he or any other citizen is in a bodily or mental condition, which menaces his neighbors' health or comfort. He is willing to use himself and his property so as not to do injury to others.

The Court in the Slaughter-House Cases (*ubi supra*) points out that the purpose of the Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution was the freedom of the African

race and the security and perpetuation of that freedom. As the Fourteenth Amendment has so often been appealed to for the protection of property, this plaintiff appeals to it with confidence for the protection of his freedom.

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